The Exclusionary Rule in Immigration Proceedings and Motions to Suppress

I. Burdens

A. Whenever an alien in removal proceedings questions the legality of evidence, he or she must provide proof establishing a prima facie case that the DHS's evidence was unlawfully obtained before the burden will shift to the DHS to justify the manner in which it obtained the evidence. *Matter of Wong*, 13 I&N Dec. 820, 822 (BIA 1971); *Matter of Barcenas*, 19 I&N Dec. 609, 611 (BIA 1988). The motion to suppress must enumerate the articles to be suppressed. *Wong*, 13 I&N Dec. at 822. The motion must be supported by an affidavit containing specific and detailed statements based on personal knowledge. *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 505 (BIA 1980); *Matter of Tang*, 13 I&N Dec. 691 (BIA 1971).

B. Alienage

1. The DHS has the burden of establishing alienage. *See, e.g., Matter of Tijerina-Villarreal*, 13 I&N Dec. 327 (BIA 1969); 8 C.F.R. § 1240.8(c).

2. If the DHS establishes alienage by clear and convincing evidence, the burden shifts to the respondent to establish time, place, and manner of entry. *Id*; INA § 291.

II. Invoking the Fifth Amendment Privilege Against Self-Incrimination

A. The Fifth Amendment privilege against self-incrimination "applies alike to civil and criminal proceedings, wherever the answer might tend to subject to criminal responsibility him who gives it." *McCarthy v. Arndstein*, 266 U.S. 34, 40 (1924); *see also Matter of Carrillo*, 17 I&N Dec 30 (BIA 1979).

B. A Fifth Amendment privilege against self-incrimination must be asserted on a question-by-question basis, and, as to each question asked, the party has to decide whether or not to raise his or her Fifth Amendment right. *See Garcia-Quintero v. Gonzales*, 455 F.3d 1006, 1019 (9th Cir. 2006). A respondent who remains silent when confronted with evidence of his alienage, the circumstances of his entry, or his deportability, may leave himself open to adverse inferences, which may properly lead in turn to a finding of deportability against him. *Matter of Guevara*, 20 I&N Dec. 238 (BIA 1991)

C. Invoking the right against self-incrimination may result in an alien failing to meet his or her burden of proof for discretionary relief. *See Matter of Marques*, 16 I&N Dec. 314, 316 (BIA 1977).

III. Grounds for Suppression: Fourth Amendment

A. Generally, the exclusionary rule does not apply in removal proceedings. *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984). However, the exclusionary rule may apply where there are "egregious violations of the Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained" or if "there developed good reason to believe that Fourth Amendment violations by INS officers were widespread." *Id.* at 1050-51; *see also Matter of Toro*, 17 I&N Dec. 340, 343 (BIA 1980) (finding that circumstances surrounding an arrest and interrogation in violation of Fourth Amendment may result in evidence, the admission of which would be fundamentally unfair and violate the Due Process Clause of the Fifth Amendment).

1. Seizure

"[A]n initially consensual encounter between a police officer and a citizen can be transformed into a seizure or detention within the meaning of the Fourth Amendment, 'if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.'" *INS v. Delgado*, 466 U.S. 210, 215 (1984) (quoting *United States v. Mendenhall*, 446 U.S. 544, 554 (1980). Where an individual's freedom of movement is restricted by a factor independent of law enforcement conduct, such as being a passenger on a bus, the proper analysis is "whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter." *Florida v. Bostick*, 501 U.S. 429, 436 (1991).

2. Violations of the Fourth Amendment

a) To lawfully stop a person, the officer must have a reasonable suspicion that the person is unlawfully present in the United States and must be able to articulate objective facts to support that suspicion. *United States v. Brignoni-Ponce*, 422 U.S. 873, 887 (1975); *Orhorhaghe v. INS*, 38 F.3d 488, 497 (9th Cir. 1994).

1) Proximity to the border and the suspect's behavior may be considered. *United States v. Garcia-Barron*, 116 F.3d 1305, 1308 (9th Cir. 1997); *United States v. Tehrani*, 49 F.3d 54 (2d Cir. 1995).

2) Speaking a foreign language may be considered along with the person's inability to speak English, but that factor alone will not justify a stop. *United States v. Manzo-Jurado*, 457 F.3d 928, 937 (9th Cir. 2006).

3) Failure to acknowledge a law enforcement officer may be considered as a factor. *United States v. Arvizu*, 534 U.S. 266, 275-76 (2002).

b) To lawfully execute a warrantless arrest, the officer must have a reason to believe that the person is unlawfully present in the United States and that the individual is likely to escape before a warrant can be obtained. *See* INA § 287(a)(2).

3. Standards for an Egregious Violation of the Fourth Amendment

a) **Second Circuit** – An egregious violation exists where (1) the violation transgressed notions of fundamental fairness; or (2) the violation—regardless of the egregiousness or unfairness—undermined the probative value of the evidence obtained. *Maldonado v. Holder*, 763 F.3d 155 (2d Cir. 2014); *Cotzojay v. Holder*, 725 F.3d 172 (2d Cir. 2014); *Almeida-Amaral v. Gonzales*, 461 F.3d 231, 234-35 (2d Cir. 2006).

b) **Third Circuit** – Suppression may be warranted based on egregious violations in the individual case (which is determined on a case-by-case basis) or based on a widespread pattern of violations. *Oliva-Ramos v. Atty. Gen. of the United States*, 694 F.3d 259 (3d Cir. 2012).

c) **Fourth Circuit** – The exclusionary rule does apply in removal proceedings where there has been an egregious violation. The determination of whether there has been an egregious violation is based on the totality of the circumstances. *Yanez-Marquez v. Lynch*, 789 F.3d 434 (4th Cir. 2015). In addition to federal officers, the "demanding standard" under the "egregious violation" exclusionary rule also applies in civil removal proceedings to state and local officers. In addition to federal officers, the "demanding standard" under the "egregious violation" exclusionary rule also applies in removal proceedings to state and local officers. *Sanchez v. Sessions*, 885 F.3d 782, 790 (4th Cir. 2018). A stop or seizure based solely on an abuse of an officer's legal authority and without reasonable suspicion of criminal activity will usually be egregious, but more may be required in some circumstances. *Id.* at 789.

d) **Eighth Circuit** – The Eighth Circuit has noted that the exclusionary rule may apply in instances where there has been an egregious violation, but so far has not found that exclusion of evidence was compelled. They have given examples of where an egregious violation may have occurred but so far have not held that a violation was egregious. The determination would be based on the totality of the circumstances, and must include determinations regarding whether the violation transgressed notions of fundamental fairness and whether the violation undermined the probative value of the

evidence. *Chavez-Castillo v. Holder*, 771 F.3d 1081 (8th Cir. 2014); *Carcamo v. Holder*, 713 F.3d 916, 922 (8th Cir. 2013). The exclusionary rule is not available to remedy violations of the Federal Educational Rights and Privacy Act. *Downs v. Holder*, 758 F.3d 994 (8th Cir. 2014).

e) **Ninth Circuit** – An egregious violation of the Fourth Amendment occurs where the violation is a bad faith violation. *Gonzalez-Rivera v. INS*, 22 F.3d 1441, 1449 n.5 (9th Cir. 1994). A bad faith violation occurs where evidence is obtained (1) by a deliberate violation of the Fourth Amendment or (2) by conduct a reasonable officer should have known is in violation of the Constitution. *Id.* at 1449 (quoting *Adamson v. Comm'r*, 745 F.2d 541, 545 (9th Cir. 1984)). *See Martinez-Medina v. Holder*, 673 F.3d 1029 (9th Cir. 2011).

1) Cases finding egregiousness: *Sanchez v. Sessions*, 870 F.3d 901 (9th Cir. 2017) (CBP officers seized and detained the respondent based on his Latino ethnicity alone); *Lopez-Rodriguez v. Mukasey*, 536 F.3d 1012, 1018 (9th Cir. 2008) (nonconsensual warrantless entry into home); *Orhorhaghe v. INS*, 38 F.3d 488, 493-94 (9th Cir. 1994) (nonconsensual warrantless search based on alien's foreign-sounding name).

IV. Grounds for Suppression: Fifth Amendment

A. The Due Process Clause of the Fifth Amendment entitles non-citizens to fair removal proceedings and mandates that evidence be used in a fundamentally fair manner. *See Bridges v. Wixon*, 326 U.S. 135, 154 (1945); *United States ex rel. Vajtauer v. Comm'r*, 273 U.S. 103, 106 (1927); Matter of Toro, 17 I&N Dec. 340, 343 (BIA 1980). Evidence obtained in violation of the Due Process Clause is suppressible. See *Matter of Sandoval*, 17 I&N Dec. 70, 83 n.23 (BIA 1979).

1. Due process requires that statements which are coerced or involuntarily given be excluded from the record. *Matter of Garcia*, 17 I&N Dec. 319, 321 (BIA 1980); *Navia-Duran v. INS*, 568 F.2d 803, 811 (1st Cir. 1977); *Singh v. Mukasey*, 553 F.3d 207, 214-16 (2d Cir. 2009).

a) Where the immigration officer fails to provide the advisals at 8 C.F.R. § 287.3(c), such a failure is a factor to consider in determining whether the alien's statements were involuntarily given. *Matter of Garcia*, 17 I&N Dec. 319, 321 (BIA 1980); *Navia-Duran v. INS*, 568 F.2d 803, 811 (1st Cir. 1977); *Sing v. Mukasey*, 553 F.3d 207, 214-16 (2d Cir. 2009). However, a failure to provide the advisals would not render an otherwise voluntary statement inadmissible. *Navarro-Chalan v. Ashcroft*, 359 F.3d 19, 23 (1st Cir. 2004). The above cases addressed 8 C.F.R. § 287.3(c)

before *Matter of E-R-M-F- & A-S-M-*, 25 I&N Dec. 580 (BIA 2011) made clear that the advisals are not required to be given until the NTA is filed.

b) Interference with an individual's exercise of the right to counsel will render a statement involuntary. *Matter of Garcia*, 17 I&N Dec. 319, 321 (BIA 1980).

2. 8 C.F.R. § 287.8(c)(2)(vii) prohibits immigration officers from using threats, coercion, or physical abuse to induce a suspect to waive his or her rights or to make a statement. Therefore, statements obtained through coercion should be suppressed as a regulatory violation as well as a Fifth Amendment violation.

3. Factual scenarios to consider:

a) Denial of food or drink. *Mineo v. INS*, 19 F.3d 11 (4th Cir. 1994) (unpublished).

b) Threats of inevitable deportation or promised preferential treatment. *Navia-Duran v. INS*, 568 F.2d 803 (1st Cir. 1977).

c) Length and time of day of the interrogation. *Navia-Duran v. INS*, 568 F.2d at 804, 810.

V. Grounds for Suppression: Regulatory Violations

A. Evidence obtained in violation of federal regulations may also be suppressed if (1) the violated regulation is promulgated to serve "a purpose of benefit to the alien" and (2) the violation "prejudiced interests of the alien which were protected by the regulation." *Matter of Garcia-Flores*, 17 I&N Dec. 325, 328 (BIA 1980).

1. To demonstrate prejudice, the alien must establish that the outcome of the case would be different if the regulatory provision had not been violated. *Martinez-Camargo v. INS*, 282 F.3d 487, 492 (7th Cir. 2002).

a) Prejudice is presumed where (1) compliance with the regulation is mandated by the Constitution or (2) a procedural framework designed to ensure the fair processing of an action affecting an individual is created, but not followed by an agency. *Garcia-Flores*, 17 I&N Dec. at 329. *See Leslie v. Att'y Gen.*, 611 F.3d 171, 178 (3d Cir. 2010).

b) Relevant Regulatory Provisions

1) **Interrogation** - "An immigration officer, like any other person, has the right to ask questions of anyone as long as the immigration officer does not restrain the freedom of an individual, not under arrest, to walk away." 8 C.F.R. § 287.8(b)(1). See INA § 287(a)(1). Section 287(a)(1) of the act requires that immigration officers possess a "reasonable suspicion of alienage" before questioning individuals about their immigration status, even where the individuals are not being detained. *Matter of King and Yang*, 16 I&N Dec. 502, 504-05 (BIA 1978).

2) **Brief Detentions** – "If the immigration officer has a reasonable suspicion, based on specific articulable facts, that the person being questioned is, or is attempting to be, engaged in an offense against the United States or is an alien illegally in the United States, the immigration officer may briefly detain the person for questioning." 8 C.F.R. § 287.8(b)(2).

3) **Arrests** – An immigration officer authorized by 8 C.F.R. § 287.5(c)(1) has the power to arrest aliens for immigration violations. *See* INA § 287(a)(2). An officer may arrest a person only when he has reason to believe that the person to be arrested has committed an offense against the United States or is an alien illegally in the United States. 8 C.F.R. § 287.8(c)(2)(i). "A warrant of arrest shall be obtained except when the designated immigration officer has reason to believe that the person is likely to escape before a warrant can be obtained." 8 C.F.R. § 287.8(c)(2)(ii).

4) **Arrests without warrant** – The Act empowers immigration officers authorized by regulation to arrest aliens whom the officers have reason to believe is in the United States in violation of any law or regulation made in pursuance of law regulating the admission, exclusion, expulsion or removal of aliens. INA § 287(a)(2). 8 C.F.R. § 287.5(c)(1) authorizes a specified list of immigration officers to conduct these arrests.

5) **Examination of Aliens Arrested Without Warrant** – "An alien arrested without a warrant of arrest under the authority contained in § 287(a)(2) of the Act will be examined by an officer other than the arresting officer. If no other qualified officer is readily available and the taking of the alien before another officer would entail unnecessary delay, the arresting officer . . . may examine the alien." 8 C.F.R. § 287.3(a).

(a) The Constitution does not mandate compliance with this section, nor is there any evidence that this section was promulgated to protect fundamental statutory or constitutional rights. *See Martinez-Camargo v. INS*, 282 F.3d 487, 492 (7th Cir. 2002).

6) **Determination of Proceedings After Examination** – If the examining officer is satisfied that prima facie evidence exists demonstrating that the arrested alien was entering, attempting to enter, or is present in the United States in violation of the immigration laws, the examining officer will (1) refer the case to an immigration judge; (2) order the alien removed; or (3) take whatever other action may be appropriate or required by the applicable laws or regulations. 8 C.F.R. § 287.3(b).

7) **Provision of Advisals** – "[A]n alien arrested without a warrant and placed in formal proceedings under section 238 or 240 of the Act will be advised of the reasons for his or her arrest and the right to be represented at no expense to the Government. The examining officer will provide the alien with a list of the available free legal services . . . The officer will also advise the alien that any statement made may be used against him or her in a subsequent proceeding." 8 C.F.R. § 287.3(c). *In Matter of E-R-M-F- & A-S-M-*, 25 I&N Dec. 580 (BIA 2011), the Board held that this regulation does not require immigration officers to provide these advisals until after the alien who has been arrested without a warrant is placed in formal proceedings by the filing of a Notice to Appear.

(a) 8 C.F.R. § 287.3(c) was intended to serve a purpose of benefit to the alien. *Matter of Garcia-Flores*, 17 I&N Dec. at 329.

8) **Alien's Right to Counsel** – 8 C.F.R. § 292.5(b) states that "[w]henever an examination is provided for in this chapter, the person involved shall have the right to be represented by an attorney or representative . . . ."

(a) ICE refers to post-arrest questioning of aliens as "examination" in its regulations. See 8 C.F.R. § 287.3(a). Therefore, aliens have a right to counsel at those examinations. *See Kandamar v. Gonzales*, 464 F.3d 65, 71 (1st Cir. 2006). However, the alien

is not entitled to be advised of this right until the NTA is filed with the immigration court. *See E-R-M-F- & A-S-M-*, 25 I&N Dec. at 584.

(b) Where the alien is denied the opportunity to exercise this right, the alien's statements are considered involuntary and must be excluded. *See Matter of Garcia*, 17 I&N Dec. 319 (BIA 1980).

VI. Common issues

A. Alleged Violations Involving non-ICE Law Enforcement Officers

1. Regulatory violations

a) In *Samayoa-Martinez v. Holder*, 558 F.3d 897, 900-01 (9th Cir. 2009), the Ninth Circuit found that the military police officer who arrested Samayoa was not an agent of the former INS and, therefore, was not required to comply with former INS regulations. The court also noted that the military police officer had authority to arrest Samayoa "for on-base violations of civil law." Id. at 901.

b) INA § 287(g)(10)

1) Pursuant to § 287(g)(1), state and local law enforcement may perform certain immigration officer functions if they enter into an agreement with DHS.

2) Section 287(g)(10) states that "Nothing in this subsection shall be construed to require an agreement under this subsection in order for any officer or employee of a State or political subdivision of a State – (A) to communicate with the Attorney General regarding the immigration status of any individual, including reporting knowledge that a particular alien is not lawfully present in the United States; or (B) otherwise to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States."

3) DHS may argue that, pursuant to § 287(g)(10)(B), a state or local police officer is authorized to arrest, detain, and/or transport an alien. Courts have interpreted this section of the Act in different ways.

4) The Sixth Circuit has stated that this section stands for the proposition that local law enforcement officers cannot enforce completed violations of civil immigration law (i.e.,

illegal presence) unless specifically authorized to do so by the Attorney General . . .” *United States v. Urrieta*, 520 F.3d 569, 575 (6th Cir. 2008).

5) The Eighth Circuit has interpreted § 287(g)(10)(B) to authorize state law enforcement to, at the request of ICE, take into custody, transport, and detain overnight an individual who had been ticketed for speeding. *United States v. Quintana*, 623 F.3d 1237, 1242 (8th Cir. 2010).

a) The Ninth Circuit interprets the “otherwise to cooperate” language of § 287(g)(10)(B) to mean that “when the Attorney General calls upon state and local law enforcement officers – or such officers are confronted with the necessity – to cooperate with federal immigration enforcement on an incidental and as needed basis, state and local officers are permitted to provide this cooperative help without the written agreements that are required for systematic and routine cooperation.” *United States v. Arizona*, 641 F.3d 339, 349 (9th Cir. 2010) (emphasis in original).

b) The Tenth Circuit has found that this section “evinces a clear invitation from Congress for state and local agencies to participate in the process of enforcing federal immigration laws.” *United States v. Vasquez-Alvarez*, 176 F.3d 1294, 1300 (10th Cir. 1999).

c) An authorized immigration officer may issue a detainer which serves to advise another law enforcement agency that ICE seeks custody of an alien presently in the custody of that agency for the purpose of arresting and removing the alien. 8 C.F.R. § 287.7(a).

B. Independent Source Doctrine

1. An alien’s identity is never suppressible, even if it was obtained as a result of an unlawful arrest, search, or interrogation. *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1039 (1984).

a) This has led some courts to find that pre-existing governmental records are not suppressible under *Lopez-Mendoza* because they are related to identity. *United States v. Bowley*, 435 F.3d 426, 430-41 (3d Cir. 2006);

United States v. Roque-Villanueva, 175 F.3d 345, 346 (5th Cir. 1999); *United States v. Farias-Gonzalez*, 556 F.3d 1181, 1189 (11th Cir. 2009). However, other courts have held that such records can be excluded. *Pretzatzin v. Holder*, 736 F.3d 641 (2d Cir. 2013); *United States v. Oscar-Torres*, 507 F.3d 224, 227-30 (4th Cir. 2007); *United States v. Guevara-Martinez*, 262 F.3d 751, 753-55 (8th Cir. 2001*); United States v. Garcia-Beltran*, 389 F.3d 864, 865 (9th Cir. 2004); *United States v. Olivares-Rangel*, 458 F.3d 1104, 1111-12 (10th Cir. 2006).

2. Evidence of alienage is treated as separate from evidence of identity and is suppressible. *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1039 (1984); *Almeida-Amaral v. Gonzales*, 461 F.3d 231, 234 (2d Cir. 2006); *Puc-Ruiz v. Holder*, 629 F.3d 771, 777 n.1 (8th Cir. 2010); *Matter of Sandoval*, 17 I&N Dec. 70, 79 (BIA 1979). *But see United States v. Garcia-Garcia*, 633 F.3d 608, 616 (7th Cir. 2011).

3. Any evidence obtained independently of a deficient search may be relied upon. *Matter of Cervantes-Torres*, 21 I&N Dec. 351, 353 (BIA 1996).

   a) If the alien admits factual allegations or fails to object to documents sufficient to establish removability, the IJ may determine that removability has been established by clear and convincing evidence, notwithstanding the existence of inadmissible prior statements. See *Miguel v. INS*, 359 F.3d 408, 410-11 (6th Cir. 2004); 8 C.F.R. §§ 1240.8(a), 1240.10(c).

   b) DHS may use the alien's identity to obtain information regarding prior entries or immigration violations from official files maintained by DHS or other entities. *United States v. Guzman-Bruno*, 27 F.3d 420 (9th Cir. 1994); *United States v. Orozco-Rico*, 589 F.2d 433, 435 (9th Cir. 1978). *Matter of Cervantes-Torres,* 21 I&N Dec. 351, 353-54 (BIA 1996).

C. Reliability of the Form I-213

1. "[A]bsent any evidence that a Form I-213 contains information that is inaccurate or obtained by coercion or duress, that document, although hearsay, is inherently trustworthy and admissible as evidence to prove alienage or deportability." *Matter of Gomez-Gomez*, 23 I&N Dec. 522, 524 (BIA 2002). An I-213 may be suppressed if the officer completing it relied on the hearsay statements of a non-governmental third party who is not the respondent and that third party is not made available for cross-examination. *See Murphy v. INS*, 54 F.3d 605, 610 (9th Cir. 1995).

2. An I-213 will only be suppressed based on incorrect factual information where that factual information is material to the purpose for which the form was admitted. *See Espinoza v. INS*, 45 F.3d 308, 309 (9th Cir. 1995).

D. Waiver or Collateral Estoppel

1. A guilty plea in criminal court does not preclude a respondent from moving to suppress evidence in removal proceedings. *See United States v. Gregg*, 463 F.3d 160, 164 (2d Cir. 2006).